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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RONALD BROWN, Defendant and Appellant.	C085470 (Super. Ct. Nos. 16FE003203,17FE007336)

After a failed attempt to steal socks from a shoe store, defendant Ronald Brown returned to the store a short time later and stole several shoes. He was charged with robbery and criminal threats arising from the shoes incident. Defendant contends the prosecution violated his due process rights by failing to clearly communicate its election of the underlying act for the lesser included petty theft charge, i.e., the charged shoes incident versus the uncharged socks incident. Defendant maintains the jury could have found him guilty of petty theft relating to the socks incident, and if so, he was denied his constitutional right to a unanimous verdict by the unclear election.

Should we find defendant forfeited his prosecutorial misconduct claim because trial counsel failed to object to the prosecutor's omission, defendant claims his trial counsel's ineffective assistance prejudiced him because he could have received a more favorable verdict had his counsel argued the socks incident was an attempted petty theft. Defendant also contends the trial court erred by imposing improper restitution and parole revocation fines relating to a 2016 conviction. We conclude the improper fines issue is moot because it has already been corrected by the trial court, defendant forfeited his prosecutorial misconduct claim, and defendant failed to show ineffective assistance of counsel. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I

The Socks Incident

On April 20, 2017, defendant walked into a shoe store with a half-empty wine bottle in a paper bag. The only other person in the store was Waskar Gomez, the store manager. Gomez saw defendant grab a pair of socks and stuff them in the front of his pants. When Gomez asked for the socks back, defendant returned them and left the store at Gomez's request without incident. Gomez found some bags where defendant had been standing, which he put under the counter by the cash register without inspecting them.

II

The Shoes Incident

A few minutes after the socks incident, defendant returned to the store. The parties disputed much of what happened next.

Defendant testified he returned to the store to retrieve his backpack, which contained most of his possessions and memorabilia. When Gomez refused to return defendant's bag, defendant started grabbing shoeboxes, intending to use them as leverage for the return of his backpack. Gomez blocked his exit from the store. Because he was very upset, defendant admitted trying to intimidate Gomez into returning his bag,

including shoving Gomez twice and threatening to fight him. Defendant denied ever intending to steal the shoes or threatening to kill Gomez. When a sergeant from the Sacramento County Sheriff's Department arrived, Gomez allowed defendant to leave the store carrying two shoeboxes containing three pairs of shoes. Defendant knew the sergeant was there when he left the store and took the shoes to him to explain the situation.

Gomez testified he never saw a backpack, and defendant never mentioned a bag when he returned to the store. Instead, Gomez said defendant came in acting belligerent, walking around the store, and grabbing shoes. Gomez called 911, telling the operator a drunk person was refusing to leave and was threatening to "beat [his] butt." Gomez blocked defendant's exit with the shoes for approximately 20 minutes, as defendant yelled and walked around the store, sometimes putting the shoeboxes down to scream in Gomez's face. Defendant also shoved him in the chest with both hands, causing Gomez to rock back a bit and threatened to kill him with his bare hands several times, among other threats. Even though he was larger than defendant, Gomez feared defendant's level of anger and threats because he was unsure what defendant was going to do or if he was carrying a weapon.

A customer testified she arrived during the confrontation and called 911 at Gomez's request.[1] The customer could not hear what was being said inside, but saw Gomez holding defendant back with an open palm and defendant shoving Gomez a couple of times.

After defendant was arrested, Gomez determined the value of the stolen shoes was about $230. Gomez also gave the arresting officer defendant's bags from behind the

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[1] For her safety, Gomez would not let the customer in, but spoke to her through a crack in the door.

register. At trial, the officer confirmed the backpack was the point of contention between Gomez and defendant.

III

The Charges, Trial, And Sentencing

The prosecution charged defendant with second-degree robbery and making criminal threats and alleged a prior conviction enhancement. The prosecution also alleged a violation of probation in a 2016 case (case No. 16FE003203), in which defendant entered no contest pleas for vandalism and drug possession. In the 2016 case, the trial court sentenced defendant to five years' probation and 344 days in county jail with credit for time served and imposed a $100 restitution fine, with a probation revocation fine in the same amount imposed but stayed unless probation was revoked. Defendant pled not guilty to the new charges and denied the allegations.

During jury instruction discussions at defendant's resulting trial, the trial court indicated it would sua sponte instruct the jury on petty theft as a lesser included offense to robbery. Because the court was instructing on petty theft, defense counsel requested a prosecutorial election or unanimity instruction for the underlying act. Counsel was concerned evidence from the socks incident could also meet the elements for petty theft because it involved conduct similar to the shoes incident. The judge responded the socks incident was more of an attempt crime, but said: "I understand your point, [counsel], and, that is, that the jury might be confused unless there's something that's addressed by the People stating, we want you to know right at the outset we're not talking about the socks[,] we're talking about the shoes." The prosecutor agreed: "Yes. I actually intended to give it in my opening and I forgot. I'll do it in closing. [¶] . . . This [was] always about the shoes, not the socks." Defense counsel was satisfied, "[a]s long as it g[ot] addressed."

The prosecution next noted a unanimity instruction was required under its theory that defendant's threats could meet the "fear" element of robbery requiring force or fear.[2] All parties agreed the jury would be instructed on unanimity for the robbery and criminal threats charges.

During closing argument, the prosecutor argued defendant's attempted theft of the socks demonstrated his intent[3] to steal the shoes for the robbery charge: "Well, we know he went into the store the first time and stole some shoes. I'm sorry, stole some socks. He went into the store to steal stuff." The prosecutor did not discuss the elements for petty theft and neither did defense counsel. Near the end of his closing argument, the prosecutor said: "When it comes down to it, Ladies and Gentlemen. It's simple. [Defendant] went in to steal something. First tried to steal socks. Let's be clear, he's not being charged for the socks. He's being charged for the shoes. But first he tries to go

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[2] Penal Code section 211 provides: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of *force or fear*." (Italics added.)

Penal Code section 422, subdivision (a) states: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and *thereby causes that person reasonably to be in sustained fear for his or her own safety* or for his or her immediate family's safety . . . ." (Italics added.)

[3] The prosecutor developed this evidence during cross-examination of defendant, asking him: "Sir, it's fair to say that when you first entered that store . . . your intent was to steal those *socks*, right?" (Italics added.) After defendant admitted the attempted theft, the prosecutor impeached him with prior theft convictions, inquiring: "Sir, isn't it also true this is not the first time you committed petty theft?" Defendant admitted to three prior theft convictions. The prosecutor then asked: "But today, you're saying, sir, that you did not intend to steal those *shoes*, is that what you're saying?" (Italics added.)

and steal socks. Didn't work. He goes back in and he tries to take the shoes. And he used force and fear to try and get away with it. It's that simple." Defense counsel did not object during the prosecutor's closing argument.

The next day, the jury received, *inter alia*, instructions on robbery and criminal threats. The jury also received a unanimity instruction for the robbery and criminal threats charges based on CALCRIM No. 3501 as follows: "The defendant is charged with robbery in Count One and with making criminal threats in Count Two sometime during the period of April 20th, 2017. The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless: [¶] One. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed. [¶] Or two. You all agree that the People have proved that the defendant committed all of the acts alleged to have occurred during this time period."

Immediately thereafter, the court instructed the jury using CALCRIM No. 3517: "If all of you find the defendant is not guilty of the greater crime, you may find him guilty of a lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and a lesser crime for *the same conduct*. [¶] Now I will explain to you the crime affected by this instruction. *Petty theft is a lesser crime of robbery as charged in Count One*." (Italics added.)

The jury acquitted defendant of robbery but found him guilty of petty theft and felony criminal threats. The court granted defendant's motion to strike the prior conviction allegation, imposed and stayed a 180-day sentence for petty theft, sentenced defendant to the upper term of three years for criminal threats, and denied probation. The court further found defendant violated probation in the 2016 case, which it revoked, and imposed a concurrent two-year term. The court also ordered defendant to pay a

restitution fine of $300, with an additional parole revocation fine in the same amount, suspended unless parole is revoked.

DISCUSSION

I

The Prosecutorial Misconduct Claim Is Forfeited

Defendant contends the prosecutor committed prejudicial misconduct during his closing argument by failing to inform the jury the petty theft charge was not based on the socks incident, thereby violating his due process rights to a unanimous verdict and a fair trial. The People contend defendant forfeited this contention because he neither objected to the prosecutor's closing argument at trial, nor requested an admonition from the judge to correct any improper remarks. We agree the contention is forfeited.

" 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' " (*People v. Prieto* (2003) 30 Cal.4th 226, 259.) Failure to object forfeits the claim unless a "timely objection and/or a request for admonition . . . would be futile," " ' "an admonition would not have cured the harm caused by the misconduct," ' " or a request for curative admonition would have been impracticable. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Defendant made no objection to the prosecutor's closing argument at trial and, on appeal, makes no argument with supporting facts and authority against a finding of forfeiture, waiving any such argument. (Cal. Rules of Court, rule 8.204(a)(1)(C); *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363-364.) Accordingly, defendant forfeited his claim of prosecutorial misconduct.

II

Defendant Did Not Receive Ineffective Assistance Of Counsel

Anticipating our forfeiture determination, defendant argues his trial counsel was ineffective for failing to object to the prosecutor's closing argument because the prosecutor did not make exceedingly clear that the lesser included petty theft charge related only to the shoes incident. The People argue the prosecutor's closing argument was proper and defendant cannot show prejudice. We agree with the People, there was no ineffective assistance of counsel.

To establish ineffective assistance of counsel under federal and California constitutional standards, defendant must, by a preponderance of the evidence, prove: (1) his trial counsel's representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms; and (2) the deficiency resulted in prejudice to defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) The defendant must affirmatively prove that, but for counsel's errors, defendant had a reasonable probability of a better outcome, where a " 'reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

If the record "fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Maury*, *supra*, 30 Cal.4th at p. 389.) Because trial counsel may have tactical reasons for not objecting, " 'a mere failure to object to . . . argument seldom establishes counsel's incompetence.' " (*People v. Wharton* (1991) 53 Cal.3d 522, 567; *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007 [reversal appropriate only when "there could have been no rational tactical purpose for counsel's challenged act or omission"].)

First, the record is silent as to why trial counsel did not object to the prosecutor's closing argument. Accordingly, defendant's claim must be rejected. (*People v. Huggins* (2006) 38 Cal.4th 175, 205.) We note there was also a potential tactical purpose for not objecting -- that is, to not draw the jury's attention to the socks incident in light of the prosecutor's argument that the socks incident established intent to steal the shoes.

Second, as the People note, and we agree, the prosecutor clearly elected the shoes incident as the basis for the charges against defendant. A defendant's right to a unanimous jury verdict requires that the jury agree unanimously the defendant is guilty of a *specific* crime. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*Ibid*.)

Here, the prosecutor clearly stated in closing argument he was charging defendant with the shoes incident, not the socks incident. He said: "*Let's be clear, he's not being charged for the socks. He's being charged for the shoes.*" (Italics added.) (See *People v. Mayer* (2003) 108 Cal.App.4th 403, 418 [no error when prosecutor described evidence and basis for charges]; *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292 [prosecutor sufficiently informed jury he was using specific threat for the charge].) Defendant argues *Melhado* requires more. We disagree; *Melhado* is distinguishable.

In that case, the defendant was charged with making terrorist threats to an auto repair shop owner. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1532-1533.) Defendant visited the victim's shop three times in the same day -- at 9:00 a.m., 11:00 a.m., and again at 4:30 p.m. -- each time making threats and twice carrying what appeared to be an operable hand grenade. (*Id*. at p. 1533.) Outside the jury's presence,

and on defense counsel's motion, the prosecutor elected to rely on the 11:00 a.m. event for the terrorist threats charge. (*Id*. at p. 1535.) During closing argument, however, the prosecutor discussed all three events, emphasizing the 11:00 a.m. incident, but never explicitly informed the jury of his election. (*Id*. at p. 1536.) The trial court further refused to give a unanimity instruction. (*Id*. at p. 1532.)

The Court of Appeal reversed the conviction, explaining: "As we have discussed, the evidence presented in this case established that appellant committed two acts of making terrorist threats, each of which could have been charged as a separate offense, yet the matter went to the jury on only one such offense. Because the prosecution's election was never clearly communicated to the jury, the trial court should have instructed on unanimity. To hold otherwise would leave open the door to allowing a prosecutor's artful argument to replace careful instruction. If the prosecution is to communicate an election to the jury, its statement must be made with as much clarity and directness as would a judge in giving instruction. The record must show that by virtue of the prosecutor's statement, the jurors were informed of their duty to render a unanimous decision as to a particular unlawful act." (*People v. Melhado, supra*, 60 Cal.App.4th at p. 1539, fn. omitted.)

Here, in contrast to the facts in *Melhado*, the prosecutor clearly told the jury defendant was being charged with the shoes incident (not the socks incident) and the jury also received a unanimity instruction. That the prosecutor's statement regarding the election was made in the context of the robbery charge (rather than the lesser included petty theft offense) is inconsequential because petty theft is included in robbery and the jury was instructed that the greater and lesser crime concern "the same conduct." The jury is presumed to have read and understood the instructions given to it. (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1370.)

In his reply brief, defendant argues "[t]he only way to reach the verdicts found true by the jury are to find [defendant] guilty of taking the socks as the petty theft, and a

separate guilty verdict for making the threats" as to the shoes incident because linking the petty theft with the criminal threats equals robbery, and he was found not guilty of a robbery. Defendant is mistaken. Crimes are not "linked" together in this manner; the jury is required to find true the elements for each crime independent from the other crimes charged. Defendant does not identify, nor do we find, any inconsistency in the jury's verdicts -- both the petty theft and criminal threats verdicts can arise from the shoes incident.[4]

Because the prosecutor's election of the shoes incident as the basis for the lesser included petty theft offense was clear, defense counsel was not ineffective for failing to make a meritless objection. (*People v. Weaver* (2001) 26 Cal.4th 876, 931.)

III

Defendant's Abstract Of Judgment Argument Is Moot

Defendant contends, and the People concede, the trial court erred in imposing restitution and probation revocation fines of $300 rather than $100. After the appeal was fully briefed, the trial judge corrected the abstract of judgment to reflect the proper $100 fines. (See *People v. Cropsey* (2010) 184 Cal.App.4th 961, 966 [abstract of judgment should reflect surviving restitution fines].) Accordingly, defendant's argument is moot. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132; *McKenna v. McCardle* (1950) 97 Cal.App.2d 304, 305.)

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[4] For example: The "force or fear" requirement for robbery relates to the "felonious taking of personal property" (Pen. Code, § 211), whereas the "fear" for a criminal threat requires, as pertinent here, that the threat cause the victim to fear for his personal safety (Pen. Code, § 422, subd. (a)). The jury could have found defendant did not take the shoes through force or fear, but that his threats to Gomez during the shoes incident put Gomez in fear for his personal safety. The jury could also have found that the criminal threat related to the dispute regarding the backpack during the shoes incident, rather than the taking of the shoes themselves.

DISPOSITION

The judgment is affirmed.

/s/
Robie, Acting P. J.

We concur:

/s/
Butz, J.

/s/
Mauro, J.